



Agenda Date: 2/2/00
Agenda Item: 8A-5

STATE OF NEW JERSEY

Board of Public Utilities

*Two Gateway Center
Newark, NJ 07102*

TELECOMMUNICATIONS

IN THE MATTER OF APPLICATION OF)	
BELL ATLANTIC-NEW JERSEY, INC.)	
FOR APPROVAL OF A RESALE)	<u>ORDER APPROVING</u>
AGREEMENT WITH EMPIRE COMMUNI-)	
CATIONS, INC., UNDER SECTION 252)	<u>RESALE AGREEMENT</u>
OF THE TELECOMMUNICATIONS ACT)	
OF 1996)	DOCKET NO. TM99080633

(SERVICE LIST ATTACHED)

BY THE BOARD:

I. BACKGROUND

By letter dated August 23, 1999, Bell Atlantic-New Jersey, Inc. (BA-NJ) filed an application (Application) for approval of a negotiated Resale Agreement (the Agreement) between BA-NJ and Empire Communications, Inc., (Empire) with the Board of Public Utilities (Board) pursuant to Section 252(e) of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat.56, codified in scattered sections of 47 U.S.C. §151 et seq. (the Act). By letter dated August 28, 1998, Empire authorized BA-NJ to file the application on its behalf.

II. RESALE AGREEMENT

The Agreement, dated as of August 16, 1999, sets forth the terms, conditions and prices under which BA-NJ will offer and provide to Empire, telecommunications services available for resale and resale support services within each Local Access and Transport Area (LATA) in which they both operate within New Jersey. Attachment 1 to Exhibit II of the Agreement sets forth a detailed schedule of itemized charges. A key provision of the Agreement provides for BA-NJ to offer its telecommunications services for a wholesale discount of 17.04%, if Empire uses BA-NJ operator services and 20.03%, if Empire provides its own operator services. Other key provisions of the Agreement provide for: customers to retain their telephone numbers when they switch to Empire, including Empire customers' primary listings in the White Pages and Yellow Pages (for business customers) directories and directory assistance databases, and the provision of 911 services to all customers. The Agreement shall remain in effect from the effective date through the Initial Term Ending Date of August 22, 1999, after which it shall remain in effect until terminated as provided in the Agreement.

The Agreement provides that to the extent required by applicable law, the BA-NJ operations support systems (OSS) services that will be offered by BA-NJ to Empire shall be the same as

the BA-NJ OSS services BA-NJ offers, under agreements approved by the Board pursuant to 47 U.S.C. §252, to other telecommunications carriers that are engaged in the resale of BA-NJ retail telecommunications services pursuant to 47 U.S.C. §251(c)(4).

The Agreement provides that BA-NJ shall have the right to change the prices for such BA-NJ services, from time-to-time and to the extent such change is required, approved or permitted by applicable law, including, but not limited to, by regulation or order of the Board, the Federal Communications Commission (FCC), or other governmental entity of appropriate jurisdiction.

III. COMMENTS

By letter dated December 2, 1999, the Division of the Ratepayer Advocate (the Advocate) filed comments on the Agreement. In summary, the Advocate stated that it is satisfied that the Agreement does not discriminate against other carriers and is consistent with the public interest, convenience, and necessity, and therefore recommended that the Board approve the Agreement. Nevertheless, the Advocate believes that any determination regarding BA-NJ's satisfaction of the competitive checklist requirements found in Section 271 of the Act must be made only following formal proceedings before the Board. The Advocate noted that Section 24.1 of the Agreement acknowledges that Empire can exercise rights under Section 252(i) of the Act (the "pick and choose" rule¹). Section 252(i) of the Act provides:

A local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement².

After being subject to legal challenge, the FCC's interpretation of the "pick and choose" rule, was upheld and reinstated by the Supreme Court³. Subsequently, the Board has noted that the Supreme Court's decision regarding the "pick and choose" rule governs⁴. The Ratepayer

1The so-called "pick and choose" rule is set forth at 47 C.F.R. §51.809(a)-(c), and provides, in pertinent part, that:

[a]n incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.

See also the FCC's discussion of the "pick and choose" rule at I/M/O Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC Docket No. 96-98, FCC 96-325 (released August 8, 1996), ¶¶1309-1323.

²47 USC §252(i).

³AT&T Corp. et al. v. Iowa Utilities Board et al., 119 S. Ct. 721, 738, 142 L. Ed. 2nd 835 (1999).

Advocate requests the Board confirm its stated policy and apply the upheld and reinstated "pick and choose" rule to the present Agreement.

IV. DISCUSSION

Pursuant to 47 U.S.C. §252(a)(1), an incumbent LEC may negotiate and enter into a binding interconnection agreement with a carrier requesting interconnection, services or elements without regard to the standards set forth in 47 U.S.C. §251(b) and (c).

47 U.S.C. §252(e)(1) requires approval by the Board of any interconnection agreement adopted by negotiation or arbitration, and further requires the Board to approve or reject the Agreement, with written findings as to any deficiencies. The Act provides that the Board may reject a negotiated agreement only if it finds that:

- (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
- (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.

[47 U.S.C. §252(e)(2)(A)].

We note that pursuant to 47 U.S.C. §252(e)(4), this Resale Agreement has been deemed approved. Nevertheless, the Board's review of the Agreement in this matter indicates that the Agreement is consistent with the public interest, convenience and necessity, and that the Agreement does not discriminate against telecommunication carriers not parties to the Agreement. Therefore, the Board FINDS that the Agreement meets the standards set forth in the Act, and HEREBY APPROVES the Agreement as presented by the Parties. This approval should not be construed as preapproval of any future petitions for rate recovery of costs incurred pursuant to the Agreement. Our approval does not constitute a determination concerning BA-NJ's obligations pursuant to Section 271 of the Act, although this Agreement will be taken into consideration in that determination. In addition, our approval does not constitute a determination concerning, nor shall the Board be bound by, provisions within this Resale Agreement regarding the confidentiality of information.

Additionally, the Board DIRECTS the Parties to conform to all federal, State and Board statutes and regulations regarding service quality standards and customer relations, as applicable, including but not limited to those related to the resale of telecommunications services, the solicitation of resale customers and the submission of primary interexchange and local exchange carrier change orders to local exchange carriers.

With regard to the "pick and choose" rule, we note that the Eighth Circuit's decision regarding the FCC's "pick and choose" rule, 47 C.F.R. §51.809, was reversed by the Supreme Court and the rule was reinstated. AT&T Corp. v. Iowa Utils. Bd., 119 S. CT. 721, 738, 142 L. Ed. 2d 835 (1999). In prior Orders we have noted the importance of our interpretation of 47 U.S.C. §252(i) with regard to the State's local exchange marketplace, and have reserved the right to reconsider

⁴Order Approving Interconnection Agreement, In the Matter of the Application of Bell Atlantic-New Jersey, Inc. For Approval of an Interconnection Agreement with Nextel Communications of the Mid-Atlantic, Inc. and Smart SMR of New York, Inc., BPU Docket No. TO97100760 (August 18, 1999) at 6.

our interpretation of the "pick and choose" rule and Section 252(i) upon the conclusion of the Supreme Court's review of the Eighth Circuit Decision. We therefore note that the Supreme Court has now acted, and its decision in AT&T Corp. v. Utils. Bd. regarding the "pick and choose" rule governs.

Pursuant to 47 U.S.C. §252(h) of the Act, a copy of the Agreement will be made available for public inspection and copying within ten days of the issuance of this Order. Subsequent amendments or modifications of the Agreement are subject to review and approval by the Board.

DATED: February 2, 2000

BOARD OF PUBLIC UTILITIES
BY:

(signed)
HERBERT H. TATE
PRESIDENT

ATTEST:

(signed)
EDWARD D. BESLOW
ACTING BOARD SECRETARY

(signed)
CARMEN J. ARMENTI
COMMISSIONER

(signed)
FREDERICK F. BUTLER
COMMISSIONER